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THERESA TOYAT & ANOR v. KHL SDN BHD

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ABDUL AZIZ ABDUL RAHIM JCA
ABANG ISKANDAR JCA
B [CIVIL APPEAL NO: Q-02-2065-09-2013]
3 JULY 2015

CONTRACT: *Breach – Share sale agreement – Sale and purchase agreements to purchase shares in company – Agreements would give purchaser control of company together with an agricultural land – Whether land should be free from encumbrances pursuant to agreements – Vendors failed to ensure lands free from encumbrances – Termination of agreements – Whether purchaser intended to purchase native customary rights land under guise of agreements – Whether purchaser guilty of anticipatory breach*

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The first and second defendants were shareholders in a company, Amazing Green Sdn Bhd ('the company'), which had 100 issued and fully paid shares. 90 shares belonged to the first defendant and ten shares belonged to the second defendant. The plaintiff entered into two separate sale and purchase agreements with the first and second defendants for the purchase of their E respective issued and fully paid shares in the company. The first agreement was with the first defendant for the purchase the first defendant's 90 shares at RM19 million. The second agreement was with the second defendant for the purchase of second defendant's ten shares at RM5,648,225. The completion date for the purchase of the shares was 1 October 2008. F Subsequently, the company was beneficially granted an agricultural land ('land') by the State Authority. The legal effect of the two agreements was that the plaintiff would own the company together with the land. Pursuant to the first agreement, the defendants were to ensure that the land would be free from squatters and other encumbrances. The plaintiff subsequently G notified the defendants that there were native customary rights ('NCR') claims affecting the land. Despite reminders from the plaintiff, the defendants were unable to ensure that the land was free from squatters and encumbrances by the completion date of both agreements. The plaintiff then elected to terminate the first agreement and which termination also had the effect of terminating the second agreement. Following the termination of the H two agreements, the plaintiff's demanded for the refund of the sums paid to the first and second defendants under the first and the second agreements. Both defendants denied any liability for the said sum and contended that when the plaintiff failed to pay the balance of the purchase price and elected to prematurely terminate the agreements, the plaintiff had fundamentally I breached the agreements. In the circumstances, the defendants filed a counter claim against the plaintiff. The High Court Judge allowed the plaintiff's claim and found that the plaintiff did not commit any anticipatory breach of the two

agreements. The High Court Judge also, amongst others, dismissed the defendants' counter claim. Hence the present appeal. The issues that arose for determination, *inter alia*, were (i) whether the plaintiff's intention was to purchase the NCR land under the guise of the two agreements; (ii) whether the plaintiff was guilty of anticipatory breach.

Held (dismissing appeal with costs)
Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) A party to an illegal contract could not benefit from its own illegality and the court would refuse to enforce such a contract. The insertion of the expression 'other encumbrances' in the two agreements in relation to the land, on the balance of probability, was a precautionary measure taken by the plaintiff to ensure that when they acquired the company through the purchase of the shares, the land that was to be alienated to the company, would be free from any encumbrances so as to enable the plaintiff to have peaceful enjoyment of the land. It made no sense that the plaintiff would terminate the agreement because the defendants had failed to resolve the NCR claims on the land if the plaintiff is oblivious or unperturbed with the NCR claims on the land. (paras 23 & 33)

(2) Clause 2 of the first agreement spoke about the agreed sale price between the parties which was based 'on the said land to be alienated to the company'. The usage of this phrase showed that at the time the agreement was executed, the land had yet to be alienated even though in preamble 3 of the same agreement it was stated that 'the company is beneficially granted an agriculture land for oil palm plantation'. The provisional lease was granted one month after the first agreement was signed. Thus, the plaintiff's intention was not to purchase NCR land under the guise of the two agreements. (para 34)

(3) The promise by the defendants to deliver to the plaintiff the land free from encumbrances was already present at the time of the execution of the two agreements and it was a continuing promise until the completion date. However, the plaintiff had raised the issue of the land being encumbered by NCR claims and the defendants had been put on notice by the plaintiff that if the NCR claims were not resolved by the completion date, the plaintiff would not be in position to complete the agreements. The earliest date possible for survey works to commence in order to determine the extent of the area of the land under NCR claims would be on 26 October 2008, which date would well go beyond the completion date of the agreements which was to be on 1 October 2008. Without the final survey done, it would not be possible for the Land Code title for the land to be issued by the authorities. (para 46)

(4) The defendants failed to fulfil the two most material conditions to the first agreement namely to give the plaintiff a Land Code title to the land and to ensure that the land would be free from encumbrances before possession was given to the plaintiff. In this respect, the plaintiff could not be said to have committed an anticipatory breach of the two agreements when the defendants themselves had failed to deliver their end of the bargain. (para 47)

Bahasa Malaysia *Translation Of Headnotes*

Defendan pertama dan kedua merupakan pemegang saham dalam sebuah syarikat, Amazing Green Sdn Bhd ('syarikat') yang mempunyai 100 saham terbitan dan berbayar penuh. 90 saham dimiliki oleh defendan pertama dan sepuluh saham dimilik defendan kedua. Plaintif telah memeterai dua perjanjian jual beli berasingan dengan defendan pertama dan defendan kedua untuk belian saham tersebut. Perjanjian pertama adalah dengan defendan pertama untuk pembelian 90 saham defendan pertama dengan harga RM19 juta. Perjanjian kedua adalah dengan defendan kedua untuk pembelian sepuluh saham defendan kedua dengan harga RM5,648,225. Tarikh penyelesaian untuk pembelian saham tersebut adalah 1 Oktober 2008. Syarikat tersebut telah secara benefisial diberi tanah pertanian ('tanah') oleh Pihak Berkuasa Negeri. Kesan undang-undang kedua-dua perjanjian tersebut adalah bahawa plaintif akan memiliki syarikat tersebut bersama-sama dengan tanah tersebut. Menurut perjanjian pertama, defendan-defendan harus memastikan bahawa tanah tersebut bebas daripada setinggan dan bebanan lain. Plaintif kemudiannya telah memaklumkan kepada defendan-defendan bahawa terdapat tuntutan hak adat anak negeri ('NCR') terhadap tanah tersebut. Walaupun diberi peringatan oleh plaintif, defendan gagal untuk memastikan bahawa tanah tersebut bebas daripada setinggan dan bebanan sebelum tarikh penyelesaian kedua-dua perjanjian. Plaintif kemudiannya memilih untuk menamatkan perjanjian pertama dan penamatan itu juga mempunyai kesan menamatkan perjanjian kedua. Berikutan penamatan kedua-dua perjanjian tersebut, plaintif telah menuntut pembayaran balik jumlah wang yang dibayar kepada defendan pertama dan kedua di bawah perjanjian pertama dan kedua. Kedua-dua defendan menafikan sebarang liabiliti bagi jumlah wang tersebut dan menegaskan bahawa apabila plaintif gagal membayar baki harga belian dan memilih untuk menamatkan perjanjian secara pramatang, plaintif telah pada dasarnya melanggar perjanjian-perjanjian tersebut. Oleh demikian, defendan telah memfailkan tuntutan balas terhadap plaintif. Hakim Mahkamah Tinggi telah membenarkan tuntutan plaintif dan mendapati bahawa plaintif tidak melakukan sebarang kemungkiran jangkaan terhadap kedua-dua perjanjian tersebut. Hakim Mahkamah Tinggi juga, antara lain, menolak tuntutan balas defendan. Oleh itu rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan, antara lain, adalah (i) sama ada niat plaintif adalah untuk membeli tanah NCR di bawah nama kedua-dua perjanjian; (ii) sama ada plaintif bersalah atas pelanggaran jangkaan.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Sesuatu pihak kepada kontrak yang salah di sisi undang-undang tidak boleh mendapat manfaat daripada ketaksahan undang-undang yang dilakukan sendiri dan mahkamah tidak akan menguatkuasakan kontrak tersebut. Kemasukan ungkapan 'other encumbrances' dalam kedua-dua perjanjian berhubung dengan tanah tersebut, atas imbangan kebarangkalian, adalah langkah berjaga-jaga yang diambil oleh plaintif untuk memastikan bahawa apabila plaintif memperoleh syarikat melalui pembelian saham, tanah yang diberi milik kepada syarikat tersebut, akan bebas daripada apa-apa bebanan bagi membolehkan plaintif untuk menggunakan tanah tersebut tanpa sebarang gangguan. Tidak masuk akal bahawa plaintif akan menamatkan perjanjian tersebut kerana defendan-defendan gagal menyelesaikan tuntutan NCR ke atas tanah tersebut jika plaintif sedar atau tidak terganggu dengan tuntutan NCR ke atas tanah tersebut.

(2) Fasal 2 kepada perjanjian pertama menyatakan mengenai harga jualan yang dipersetujui antara pihak-pihak berdasarkan 'on the said land to be alienated to the company'. Penggunaan frasa ini menunjukkan bahawa pada masa perjanjian dilaksanakan, tanah tersebut masih belum diberi milik walaupun dalam mukadimah 3 perjanjian tersebut dinyatakan bahawa 'the company is beneficially granted an agriculture land for oil palm plantation'. Dari keterangan, pajakan sementara telah diberikan satu bulan selepas perjanjian pertama ditandatangani. Oleh itu, niat plaintif bukan untuk membeli tanah NCR di bawah nama kedua-dua perjanjian tersebut.

(3) Janji oleh defendan-defendan untuk menyerahkan kepada plaintif tanah yang bebas daripada bebanan telah wujud semasa pemeteraian dua perjanjian tersebut dan ia adalah janji yang berterusan sehingga tarikh penyelesaian. Walau bagaimanapun, plaintif telah membangkitkan isu tanah yang dibebani oleh tuntutan NCR dan defendan-defendan telah diberi notis oleh plaintif bahawa jika tuntutan NCR tidak diselesaikan sebelum tarikh penyelesaian, plaintif tidak akan berada dalam kedudukan untuk melengkapkan perjanjian tersebut. Tarikh paling awal untuk kerja kaji selidik dimulakan untuk menentukan keluasan kawasan tanah di bawah tuntutan NCR adalah pada 26 Oktober 2008, yang melampaui tarikh penyelesaian perjanjian. Tanpa kaji selidik yang muktamad, adalah tidak mungkin untuk hak milik Kanun Tanah bagi tanah tersebut dikeluarkan oleh pihak berkuasa.

(4) Defendan telah gagal memenuhi dua syarat yang paling penting kepada perjanjian pertama iaitu untuk memberikan plaintif hak milik Kanun Tanah kepada tanah tersebut dan untuk memastikan bahawa tanah tersebut bebas daripada bebanan sebelum milikan diberikan kepada plaintif. Dalam hal ini, plaintif tidak boleh dikatakan melakukan suatu pelanggaran jangkaan terhadap dua perjanjian tersebut apabila defendan-defendan sendiri telah gagal untuk melaksanakan peranan mereka dengan sewajarnya.

Case(s) referred to:

Alexander v. Rayson [1935] All ER Rep 185 ***(refd)***
Cheng Mun Siah v. Tan Nam Sui [1980] 1 LNS 9 HC ***(refd)***
Chettiar v. Chettiar [1962] 1 All ER 494 ***(refd)***
Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***
Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal [2010] 3 CLJ 377 CA ***(refd)***
Manang Lim Native Sdn Bhd v. Manang Selaman [1985] 1 LNS 104 SC ***(refd)***
Pearce v. Brooks [1861-73] All Er Rep 102 ***(refd)***
Robert Lee & Anor v. Wong Ah Yap & Anor [2007] 4 CLJ 1 FC ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Sebekai Plantation Sdn Bhd v. Superintendent of Lands and Surveys, Bintulu [2012] 4 CLJ 694 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24
Land Code Sarawak (Cap 81), ss. 8, 9, 28

For the appellants - Shankar Ram Asnani; M/s Thomas, Shankar Ram & Co
For the respondent - Mohd Ivan Hussein; M/s Ivan Hussein

[Appeal from High Court, Kuching; Suit No: 22-91-2010-I]

Reported by Sandra Gabriel

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] On 16 August 2013, the learned High Court Judge allowed the respondent/plaintiff's claim and made the following order:

(i) that a sum of RM3,225 be refunded to the respondent/plaintiff by the second appellant/defendant.

(ii) there be interest at 5% per annum on the above sum from 1 May 2008 till full and final settlement.

(iii) cost of RM40,000 to the respondent/plaintiff.

(iv) that a sum of RM4,960,000 be refunded to the respondent/plaintiff by the first appellant/defendant.

[2] The learned High Court Judge rejected the appellants/defendants defence and found that the respondent/plaintiff did not commit any anticipatory breach of the two agreements for the purchase of shares belonging to the first and second appellants/defendants in a company called Amazing Green Sdn Bhd ("the company") dated 2 April 2008 and 2 May 2008 respectively. The learned judge also dismissed the defendants' counter claim and the respondent/plaintiff's claim for liquidated and special damages.

[3] Both appellants/defendants now appealed against that decision. In this appeal the first and second appellant shall be referred to as they were in the High Court or collectively as the "defendants" and the respondent shall be referred to as "the plaintiff".

Background Facts

[4] The first and second defendants were all at material times the shareholders in the company. The company had 100 issued and fully paid shares. 90 shares belonged to the first defendant and ten shares belonged to the second defendant.

[5] The plaintiff entered into two separate sale and purchase agreements with the first and the second defendants respectively for the purchase of their respective issued and fully paid shares in the company. The first agreement was with the first defendant and was dated 2 April 2008 ("the first agreement") for the purchase the first defendant's 90 shares in the company for RM19 million. The second agreement was with the second defendant and was dated 2 May 2008 ("the second agreement") for the purchase of second defendant's ten shares in the company for the sum of RM5,48,225. The completion date for the purchase of the shares was 1 October 2008.

[6] The company was beneficially granted an agricultural land measuring approximately 2,850 hectares for oil palm plantation at Ulu Tinjar, Baram, Miri ("the land"). The legal effect of the two agreements is that the plaintiff would own the company together with its only asset that is the agriculture land that would be granted to it by the state authority. This was clearly provided in the first agreement.

[7] Pursuant to cl. 3(a) (ii) of the first agreement, the plaintiff paid a sum of RM2.5 million as part of the purchase price to the first defendant's solicitors, Messrs Ting Goh & Associates. This was on 30 April 2009. Under cl. 6(a) of the first agreement, the defendants were to ensure the said land would be free from squatters and other encumbrances. To assist the defendants to ensure this, the defendants' solicitors were allowed to retain a sum of RM1.5 million from the balance of the purchase price to defray all costs and expenses to ensure that the said land would be free from squatters and other encumbrances at the completion date.

[8] However, when the plaintiff's representative visited the land in June 2008, the plaintiff's representative encountered squatters who claimed native customary rights (NCR) over a substantial portion of the land. This fact was communicated by the plaintiff's solicitors to the first defendant's solicitors. An intended survey of the said land by surveyors appointed by the plaintiff in early July 2008 was unsuccessful when they were confronted with native residents claiming NCR over the land.

[9] On 25 July 2008, the plaintiff's solicitors notified the defendants by letter that there were NCR claims affecting the land and that if the claims were not resolved and the plaintiff be assured of vacant possession of the land prior to the completion date, the plaintiff would not be in a position to complete the agreement.

[10] In another development, the defendants' solicitors had on 2 September 2008 informed the plaintiff's solicitors that the original copy of the provisional lease for the said land was already in their custody and on 10 September 2008, the plaintiff's solicitors were informed by the defendants' solicitors that the defendants were ready to complete the sale of the shares on or before 1 October 2008.

[11] On 22 September 2008, the land and survey department confirmed that there could be NCR claims over the land.

[12] Despite numerous reminders from the plaintiff, the defendants were unable to ensure that the land is free from encumbrances by the completion date of both agreements. The plaintiff then treated the first defendant's failure to do so by the completion date as a breach of the first agreement. The plaintiff then elected to terminate the first agreement and which termination also had the effect of terminating the second agreement.

[13] Following the termination of the two agreements, the plaintiff's solicitors wrote to the first and the second defendants demanding for the refund of the sum of RM4,960,000 and the sum of RM3,255 paid to the first and second defendants under the first and the second agreements respectively. The same letter also demanded from the first defendant a further sum of RM4,960,000 as agreed liquidated damages. Thus, making the total sum demanded from and payable by the first defendant to the plaintiff RM9,920,000, which is to be paid within 14 days of the date of the letter. Both defendants denied any liability for the said sum.

[14] Instead, both defendants contended that their obligation to ensure that the land is free from squatters and other encumbrances was at the completion date and not prior to the completion date. Therefore, when the plaintiff failed to pay the balance of the purchase price and elected to prematurely terminate the agreements, the plaintiff had fundamentally breached the agreements. It was further contended that in the circumstances the defendants would be

entitled to forfeit all the monies under the agreements and had also filed a counter claim for it against the plaintiff. It is also the contention of both defendants that there is no genuine NCR claims on the land. The defendants also said that the land and survey department in their letter dated 22 September 2008 had stated that should the land be subject to NCR claims, the department would allow the defendants to adjust accordingly the boundary of the land in a final perimeters survey of the land.

This Appeal

[15] There are two principal issues in this appeal. The first issue is whether the plaintiff's intention was to purchase the NCR land under the guise of the two agreements. The second issue is whether the plaintiff is guilty of anticipatory breach.

[16] The defendants raised several grounds of appeal. However, the main thrust of the defendants' submission is that the two agreements were tainted with illegality. It was submitted for the defendants that the two agreements were tweaked to hide the purchase of NCR land. It was further submitted that the plaintiff knew that it was purchasing NCR lands. It was argued that this is clear from the admission made by the witnesses for the plaintiff during the trial. Learned counsel for the defendant referred to cl. 6(a) of the first agreement and argued that by virtue of the wordings or the language used in that clause, it was agreed between the parties that the NCR claims and issues relating to the land had to be resolved by the defendants as the vendors. Clause 6(a) of the first agreement provides that "the vendor shall take steps or actions and measures as may be required to ensure the said land shall and will be free from squatters and other encumbrances"; and under that same clause the vendors' solicitors were authorised to retain a sum of RM1.5 million from the balance sale price for the purposes of defraying all costs and expenses to remove the squatters and all other encumbrances so that the said land shall and will be free of those encumbrances. The defendants' counsel contended that the expression "other encumbrances" used in the said clause was done on purpose; that is to disguise the agreement's real intention or real purpose which is for the purchase of NCR land.

[17] Learned counsel for the defendants also referred to a letter dated 9 September 2008 by the plaintiff's solicitor addressed to the defendants' solicitors where reference was made to the issue of the NCR claims over the land. The relevant parts of the letter read as follows:

> We are instructed that besides our client's appointed surveyor, over the past month our client's manager and ground staff had been similarly denied access to the Land by the natives, and attempts to talk and negotiate with them have failed.

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> In the circumstances, the issue is not so much as to the area (42 hectares) allegedly affected by the NCR claims or the adjustment of the sale price. Rather, the issue are accessibility and vacant possession of the Land, and thereafter the continuous peaceful enjoyment of the Land by our client.
>
> Our client requires that each and every of these NCR claims be verified, the areas thereby affected by quantified and confirmed. Suitable resolution and compensations, if necessary, must be reached for these natives to vacate the areas concerned and to declare and undertake that they have no further claims or demands over the Land.
>
> We would like to state that as the Provisional Lease is issued for and in respect of the whole of the Land, it will be inconsistent for the same to subsist with any NCR claims. The "imperfect" title will adversely affect the value and future marketability of the Land.
>
> We have been instructed that the above issues must be resolved before completion can take place.

Relying on this letter, learned counsel of the defendants submitted that the plaintiff had knowledge of the NCR claims over the land when they entered into the two agreements with the defendants. Hence, it was argued that this is indicative of their intention to purchase the land which had NCR claims. The plaintiff being a non-native or non-native company is prohibited under the Sarawak Land Code to own or to deal with NCR land. Therefore, it was contended that in the presence of such knowledge and intention on the part of the plaintiff, the agreements entered into between the plaintiff and the defendants are tainted with illegality because the two agreements are in breach of the express provisions under s. 8 and s. 9 of the Sarawak Land Code.

[18] The law on illegality and illegal contracts is quite settled. Section 24 of the Contracts Act 1950 (Revised 1974) (Act 136) provides as follows:

> 24. What considerations and objects are lawful, and what not.
>
> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
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> (b) it is of such a nature that, if permitted, it would defeat any law;
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> (c) it is fraudulent;
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> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
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> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[19] It is pertinent to note that the two agreements in the present case are not for the purchase of land with NCR claims. The agreements were about purchase of all the shares in the company which was about to be awarded with large tract of lands for oil palm plantation. However, learned counsel for the defendants submitted that the two agreements were a disguise to purchase the land with NCR interest and therefore the agreements are void, illegal and unenforceable and in breach of express provisions of ss. 8 and 9 of the Sarawak Land Code read with s. 24 of the Contracts Act 1950. It was submitted that in the present case, the Latin maxim of "*in pari delicto potior est condition defendentis*" applied.

[20] As for the arguments that the plaintiff had knowledge that they were buying NCR land, learned counsel for the defendants relied on the testimony of PW3 who testified that he did advise the plaintiff, and that the plaintiff's position was that it believed that there were no NCR claims on the land and that if there is, they (ie the defendants) could resolve it because the defendants are family members of the then state secretary to the Sarawak Government. Learned counsel for the defendants also contended that PW2 in his testimony also admitted that there were NCR claims on the land. Learned counsel submitted that PW2 in his testimony had stated that he considered NCR as part of encumbrances though he cannot confirm whether the confrontation by the natives (when the plaintiff's representative went to visit the said land) amounts to encumbrances as stated in cl. 6(a) of the first agreement. To support his argument on the issue of illegality learned counsel referred to the case of *Manang Lim Native Sdn Bhd v. Manang Selaman* [1985] 1 LNS 104; [1986] 1 MLJ 379 where the Supreme Court held that:

> (2) The agreement made between the respondent and the appellant was an agreement made in contravention of section 8(b) of the Sarawak Land Code. As such it was entered into for an illegal consideration and was therefore a void agreement within the meaning of section 2(g) of the Contracts Act, 1950.

[21] In consequence of the illegality of the two agreements, learned counsel for the defendants submitted, the plaintiff is not entitled to benefit from the contract under the two agreements; and as such the plaintiff should not be allowed to recover any damages or money that had been paid under the illegal agreements which render the contract null and void. In support of this argument, learned counsel for the defendants refer to us the Privy Council case of *Chettiar v. Chettiar* [1962] 1 All ER 494 and the English Court of Appeal case of *Alexander v. Rayson* [1935] All ER Rep 185.

[22] In the latter case, the Court of Appeal held at p. 195:

> Where the illegal purpose has been wholly or partially effected, the law allows no *locus poenitentiae*: (see Salmond And Winfield's *Law of Contracts* at p. 152) and in *Chettiar v. Chettiar (supra)* the Privy Council held as to the illegality at p. 496 as follows:

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> Once this disclosure was made by the father, the courts were bound to take notice of it, even though the son had not pleaded it: see *Scott v. Brown, Doering, McNab & Co.*, *Slaughter & May v. Brown, Doering, McNab & Co*.
>
> He cannot use the process of the courts to get the best of both worlds - to achieve his fraudulent purpose and also get his property back. The courts will say: "Let the estate lie where it falls", see *Sajan Singh v. Sardara Ali* (9) and *Kiriri Cotton Co., Ltd v. Dewani* (10).

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[23] The legal position in our jurisdiction is the same, that is a party to an illegal contract cannot benefit from its own illegality and the court would refuse to enforce such a contract. There is a string of cases on this point which were cited by learned counsel for the defendants in his written submissions. To name a few they are: *Cheng Mun Siah v. Tan Nam Sui* [1980] 1 LNS 9; [1980] 2 MLJ 269; *Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal* [2010] 3 CLJ 377, *Robert Lee & Anor v. Wong Ah Yap & Anor* [2007] 4 CLJ 1, *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151. See also the English Court of Appeal case of *Pearce v. Brooks* [1861-73] All ER Rep 102.

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[24] Learned counsel for the plaintiff on the other hand submitted that illegality is a non-issue. Firstly, he said this was raised for the first time in this appeal and it was never part of the defendants' defence or raised as an issue during the trial. Secondly, he argued that the two agreements were for the purchase of the defendants' shares in the company. The main asset of the company was a parcel of plantation land in the process of being alienated to the company. He further submitted that the relevant terms and conditions in the first agreement between the plaintiff and the first defendant were that the vacant possession of the land were to be delivered to the plaintiff free from encumbrances at the completion date whereby a sum of RM1.5 million was to be retained by the defendants' solicitors for a period of three months after the completion of the sale and purchase under the two agreements to enable the plaintiff to survey the land to verify this. Thirdly, it was argued that the NCR claims were never considered or made part of the agreement. Learned counsel for the plaintiff submitted that at the beginning the parties only noticed the presence of loggers working on the land who may potentially stay back as squatters. It was submitted that the term "encumbrance" used in the two agreements was wide enough to cover NCR as an encumbrance. It is the contention of the plaintiff that the issue of NCR affecting the same land had surfaced prior to the completion of the sale and purchase but remained unresolved till the completion date. As such the plaintiff, as purchaser was entitled to cite the defendants as vendors for the breach of the agreements.

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[25] At this juncture it is worthwhile to note that the second agreement is only for the purchase of the remaining ten issued and fully paid shares in the company belonging to the second defendant for a sum of RM5,648,225. The first agreement is also an agreement to purchase shares in the company belonging to the first defendant for a sum of RM19 million. The two shares purchase agreements would give the purchaser (ie the respondent/plaintiff) the control of the company which was about to be awarded with an agriculture land totalling approximately 2,850 hectares for oil palm plantation at Ulu Tinjar, Baram Miri Sarawak.

[26] Thus by looking at the price paid by the plaintiff (purchaser) for all the 100 shares in the company which amount to RM14,648,225, the whole transaction was for the purchase of the company together with the land which would be alienated to the company. This intention is quite obvious from recital (4) of the first agreement which reads:

> (4) The purchaser is desirous of acquiring the said shares and the vendor being the registered shareholder of the said shares have agreed to sell and transfer the said shares to the purchaser together with the said land subject to the terms and conditions hereinafter contained.

[27] The first and the second agreement must be read together. The first agreement was referred to as the "principal agreement" in recital (3) of the second agreement.

[28] As mentioned earlier, the principal argument in this appeal centred around cl. 6 and cl. 7(b) of the first agreement. The said clauses read as follows:

> 6 (a) The Vendor hereby agrees and covenants that as at the Completion Date, the Vendor shall take all steps, actions and measures as may be required to ensure the said Land shall and will be free from all squatters and all other encumbrances and the Vendor's Solicitors shall and is hereby authorised to retain out of the balance Sale Price the sum of RM1,500,000.00 (Ringgit Malaysia One Million Five Hundred Thousand) only ("the Retention Sum") for the purposes of defraying all costs and expenses in ensuring the same.
>
> (b) Upon the execution of this Agreement, the Vendor as trustee/shareholder/director of the Company shall allow the Purchaser, its agents and or servants unfettered access to the said Land for the purposes of surveying, demarcation of boundaries and generally to ascertain whether the said Land is free from squatters.
>
> (c) The Purchaser and or its appointed Surveyor shall within three (3) months from the Completion Date confirm with the Vendor whether the said Land is in fact free from all squatters, and upon such confirmation that the said Land is so free of squatters the Vendor's Solicitors shall then be authorised to release the Retention Sum or the remaining part thereof to the Vendor.

A And

> 7 (b) Subject to Clause 1(a) above, on the completion date, the Vendor shall ensure that the said Land shall be free from all encumbrances including charges or any instruments or matters of which by reason of their registration in any register or of which by any rule of law
B or otherwise the Purchaser have or are deemed to have notice thereof.

[29] Clause 6(a) of the first agreement clearly provides that the parties had agreed that at the completion date the land must be free from any squatters and all other encumbrances. To assist the vendors (ie the defendants) in
C ensuring that the land is free from squatters and other encumbrances the parties had also agreed that the vendor's solicitors were authorised to retain RM1.5 million as retention sum for the purpose of defraying all costs and expenses relating thereto.

[30] In support of the above argument, learned counsel for the plaintiff
D referred to the evidence of PW3 who testified that the plaintiff through their solicitors was aware of the presence of loggers on the land and that cl. 6(a) was included, primarily to address the issue of loggers, to also cover other encumbrances. With regard to whether the plaintiff made any enquiry about any possible natives' claim on the land, PW3 said in evidence that the
E plaintiff believed that there were no NCR claims on the land and if there is any, the plaintiff could resolve it because the defendants are family members of the then State Secretary. PW3 is the solicitor who advised the defendants and prepared the two share purchase agreements. The next evidence referred to by learned counsel for the plaintiff is a letter dated 9 September 2008
F written by the plaintiff's solicitor (can be seen at pp. 299-300 appeal record vol. 3) to the defendants' solicitor informing the latter that the plaintiff appointed surveyor, manager and ground staff had been denied access to the land by the natives, and that attempts to talk and negotiate with the natives had failed. In the same letter the plaintiff's solicitor expressed concern as to
G the issue of accessibility and vacant possession of the land and thereafter the continuous and peaceful enjoyment of the land. What is interesting is the following paragraph found in the letter:

> Our client requires that each and every of these NCR claims be verified, the areas thereby affected be quantified and confirmed. Suitable resolution and compensations, if necessary, must be reached for these
H natives to vacate the areas concerned and to declare and undertake that they have no further claims or demands over the Land.
>
> We would like to state that as the Provisional Lease is issued for and in respect of the whole of the Land, it will be inconsistent for the same to subsist with any NCR claims. The "imperfect" title will adversely affect
I the value and future marketability of the Land.
>
> We have been instructed that the above issues must be resolved before completion can take place.

[31] The above letter was exhibited in the plaintiff's bundle of documents and marked as PBD. The documents in this bundle of documents were agreed as to the authenticity only.

[32] In our view, the evidence of PW3 and the letter referred to above show, on the balance of probability, that the plaintiff was not aware of any NCR claims or existing right on the land at the time of the signing of the two share purchase agreements executed by the plaintiff and the defendants. It is also obvious from the evidence of PW3 and the said letter that the plaintiff was very concerned with the existence of any NCR claims on the land because such claim could affect the peaceful enjoyment of the land by the plaintiff.

[33] As a matter of public record and knowledge, the law reports from Sabah and Sarawak are replete with cases on NCR claims. These cases are not simple or straight forward. Their trials may be lengthy and take a considerable amount of time. The existence of NCR and the claim as to the same by the natives in Sarawak over state land in the interior of Sarawak is an undisputable fact. Investors and land developers alike are very wary about the possibility of natives making NCR claims on land which is about to be alienated by the State. Such claim could result in delays, tense situation and higher costs (in relation to the compensation to be paid to the claimant) over a proposed project on lands affected by such claim. Therefore, in our view the insertion of the expression "other encumbrances" in the two agreements between the defendants and the plaintiff in relation to the land, on the balance of probability, is a precautionary measure taken by the plaintiff to ensure that when they acquired the company through the purchase of the shares, the land that was to be alienated to the company, would be free from any encumbrances so as to enable the plaintiff to develop the land for the purpose of which the company was acquired; that is to develop the land into an oil palm plantation and to have peaceful enjoyment of the same. Also it makes no sense to us that the plaintiff would terminate the agreement because the defendants had failed to resolve the NCR claims on the land if the plaintiff is oblivious or unperturbed with the NCR claims on the land or that the NCR claims if there is one would eventually be resolved with the help of the defendants because the defendants are the family members of the then state secretary of Sarawak Government.

[34] Another reason as to why we are of the opinion that the plaintiff's intention is not to purchase NCR land under the guise of the two agreements is because cl. 2 of the first agreement speaks about the agreed sale price between the parties which was based "on the said land to be alienated to the company". In our view the usage of this phrase shows that at the time the agreement was executed, the land has yet to be alienated even though in preamble (3) of the same agreement it was stated that "The Company is

A beneficially granted an agriculture land for oil palm plantation ...". From the documentary evidence it is noted that the first agreement was executed on 2 April 2008; but the provisional lease was registered only on 6 May 2008 which was about one month after the agreement was signed. A copy of the provisional lease was forwarded to the plaintiff by the defendants only on B 12 May 2008. Thus, it is our conclusion that at the time the first agreement between the defendants and the plaintiff was executed, the defendants were not in possession of the issued provisional lease. In the circumstances it would be impossible for the plaintiff to identify exactly the layout of the land and to what extent the land is affected by NCR claims, if any.

C **[35]** In any case, the crux of the issue that was argued before us is whether the plaintiff's intention was to purchase NCR land (which the plaintiff is prohibited by virtue of ss. 8 and 9 of the Sarawak Land Code because the plaintiff is not native) through the guise of the two sales purchase agreements. We have stated our view above that this is not the case. The learned High D Court Judge also came to the same conclusion when he said at para. 81 of her judgment as follows:

> 81. In my opinion, pursuant to Clause 6, Clause 7 (b), Clause 9 (e), Clause 9 (f), Clause 9 (u), and Clause 9 (z) of the First sale and purchase agreement, the clear intention of the parties is that the Defendants were E contractually bound to ensure that the Land was free from all encumbrances, including any NCR claims, prior to or by the Completion Date, was beyond question as the same had been repeatedly stated in the various Clauses aforesaid.

The learned judge in coming to the above conclusion had analysed cl. 6(a), F cl. 7(b), cl. 9(e), (f), (u) and (z) of the first agreement. We have already referred to cl. 6(a) and cl. 7(b) of the first agreement in the earlier part of this judgment. Clause 9(e), (f), (u) and (z) of the first agreement are as follows:

> (e) the Company is legally and beneficially entitled to the said land and that the said land is free from all encumbrances with duly issue of title deed upon the completion date. G
>
> (f) there is no option, or agreement for sale, mortgage (whether specific or floating) charge, *lien*, lease agreement or lease, overriding interest, condition, restrictive covenant, easement or other encumbrance in respect of the said land.
>
> H (u) that the company is not engaged in any litigation or arbitration proceeding and that no such proceedings and no prosecutions are pending or threatened and the company knows of no facts or matters likely to give raise thereto and that the company is not in default in respect of any obligation whether contractual or statutory.
>
> I (z) that there is not *facto* or circumstances relating to the affairs of the Company known or which ought to be known to the Company or the Vendors at the date thereof which has not been disclosed in writing to the Purchasers which if disclosed might reasonable have

> been expected to influence the decision of the Purchasers to purchase the said shares at the said price on the terms contained in this agreement or at all.

[36] Having done her analysis of the above clauses, the learned judge concluded that the provisions of cls. 7(b) and 9(e), (f), (u) and (z) are consistent with the provision in cl. 6(a) which is that the land would be free from all encumbrances with duly issue title as at the completion date. We agree with this conclusion.

[37] Still on the issue of the NCR claims or possible claim on the land, we are unable to comprehend the submission by learned counsel for the defendants that the plaintiff had all along intended to purchase NCR land. Firstly, the provisions in the first agreement clearly shows that the plaintiff wanted the defendants to deliver the land free from encumbrances (whether NCR or squatters or other encumbrances). In fact the plaintiff had gone to the extent of agreeing to allow the plaintiff's solicitors to retain RM1.5 million to defray all costs and expenses in removing the encumbrances on the land, if any. Why would the plaintiff do that if the plaintiff does not care if the land is encumbered with NCR claims or not. Secondly, learned counsel for the defendants in his written submissions had referred to the letter by Pengarah Tanah and Survei Sarawak dated 22 September 2008 to managing director of the company. The two paragraphs letter reads:

> I refer to your letter dated 14.7.2008. Further to my letter ref:39/HQ/AL/1/94(4D) dated 5.8.2008, I wish to reconfirm that our office record shows that part of Lot 22 Dulit Land District covering approximately 42 hectares was cleared area and therefore may be subject to Native Customary Rights claims. However, the determination of the claims under Native Customary Rights and the extent of its occupation, if any, can only be determined by the surveyors based on investigations and physical evidence on the ground.
>
> 2. Since the land is still held under provisional lease, should the said area be subject to genuine Native Customary Rights claims, the department will allow you to adjust accordingly the boundary in your final perimeter survey of the land to maintain the same aggregate area of 2857 hectares.

[38] It is obvious from the extract of the letter that the land and survey department had confirmed that about 42 hectares of the land had been cleared and therefore may be subjected to NCR claims. However, the land and survey department categorically stated that the actual size of the area (that may be subjected to NCR) could only be determined after survey had been done and by investigation of physical evidence on the ground. The land and survey department also suggested that since the land was still under provisional lease the boundary of the final perimeter survey could be adjusted probably by excluding the area under the NCR claims, if these claims are eventually proven by the survey to be conducted. The purpose of

A the survey is to identify the total area claimed by the natives as NCR; and this purportedly claimed area could be excluded from the original total area under the provisional lease. Thirdly, in the circumstances of this case it can be said that the plaintiff is an investor. The plaintiff wanted the land to develop it into an oil palm plantation. Having regard to the problems which
B the plaintiff would face with the natives if the land is NCR land, it would certainly affect the plaintiff's investment. The question is, would the plaintiff be so naive to proceed with the purchase of the land having known that there is a potential NCR claims on the land which could cause problems with the natives and delayed the plaintiff's proposed oil palm plantation project.
C Such position would be inconsistent with the terms of the agreement agreed between the plaintiff with the defendants that the land was to be free of squatters and other encumbrances.

[39] With regard to the second issue in this appeal that is whether the plaintiff is guilty of anticipatory breach of the two agreements, the defendants
D argued that they had fulfilled all conditions of the sale and purchase agreement in that the defendants had been issued with the provisional lease and had in fact delivered the provisional lease to the plaintiff within the time stipulated under the agreements. The delivery of the provisional lease to the plaintiff by the defendants was done well before 1 October 2008 which
E was the completion date under the agreement. Therefore, with regard to cl. 3(a)(ii) and cl. 3(b) (i) of the first agreement the defendants had performed their part of the bargain. On this issue the learned judge had rejected the argument advanced by the defendants.

[40] The learned judge had accepted the contention by the plaintiff that the
F provisional lease delivered to the plaintiff by the defendants is not the document of title envisaged or contemplated in the first agreement. This material fact is clearly pleaded in para. 15 of the plaintiff's statement of claim. The plaintiff also argued that the document of title in the form of provisional lease given to them on 12 May 2008 was an imperfect title.
G This is because the provisional lease is for an area not yet surveyed.

[41] On this issue the learned judge had accepted the law as decided in *Sebekai Plantation Sdn Bhd v. Superintendent of Lands and Surveys, Bintulu* [2012] 4 CLJ 694 and as contained in s. 28 of the Sarawak Land Code that a provisional lease is a document of title. The defendant submitted that the
H plaintiff had raised the argument as to the provisional lease being an imperfect title is an afterthought. The defendant argued that the plaintiff had rejected the provisional lease only one month before the completion date ie on 1 October 2008 and not at the time when the provisional title was given to the plaintiff on 12 May 2008 and after the plaintiff had instructed his
I solicitor to release the sum of RM2.5 million to DW2. The learned judge rejected this argument.

[42] The learned High Court Judge said that the question is whether the document of title which the parties envisaged under the first agreement is a provisional lease in respect of which no survey has been carried out or an actual lease with perimeter duly surveyed referred to as the Land Code title by the defendant solicitor. On the evidence, the learned High Court Judge was of the view that the document of title contemplated by the parties under the first agreement is an actual lease in respect of which a perimeter survey has been carried out. In particular, the learned High Court Judge had referred to exh. 57 in the plaintiff's bundle of document which is the plaintiff solicitor's letter dated 23 June 2008 that is slightly over a month after the provisional title has been given to the plaintiff, seeking confirmation whether the company has appointed any surveyor to demarcate the boundaries for the issuance of title to the land by the relevant authority. The defendants' solicitor reply (exhibited at p. 59 of the plaintiff's bundle of documents) to this letter was on 28 July 2008 where the plaintiff was informed that the defendants would proceed with the appointment of surveyor to demarcate the boundaries of the said land for the issuance of title by the relevant authority. On these two correspondences, the learned judge had concluded that subsequent to the issuance of the provisional lease, the plaintiff was pressing the defendants to appoint a surveyor to demarcate the boundaries of the land for the issuance of title by the relevant authority.

[43] The learned High Court Judge had also considered the evidence of DW1 who testified that it was the responsibility of the defendants and the company to carry out the boundary survey before the Land Code title can be issued; and that DW1 had instructed her solicitor to apply for the Land Code title. However, the learned High Court Judge noted that DW2 had testified that there was no boundary survey done for the land and thus there was no application for the issuance of the Land Code title. The learned High Court Judge had also considered cl. 4(a)(ii) of the first agreement which provides that the original document of title to the said land will be issued in favour of the company within six months from the date of this agreement or such extended time as the purchaser in its absolute discretion agreed to. On this evidence the learned High Court Judge concluded that the defendant and the company were aware of the need to have a survey done on the land before a proper lease, in the form of a Land Code title can be issued. But, the learned High Court Judge found that the defendants and their solicitors had never arranged for the survey to be done. In this regard, the learned High Court Judge found there was a joint declaration between the parties and from this joint declaration the earliest possible date for survey works to commence was 26 October 2008 despite the agreement allowing for immediate access to the land. The learned High Court Judge found that this date (ie 26 October 2008) would take it past the completion date which is on 1 October 2008.

[44] We are of the view that the learned High Court Judge is well positioned to make those findings and inferences of fact on the evidence produced before her as stated in the above paragraphs. Therefore, we agree with the learned High Court Judge that reading the first agreement which contained a stipulation that the land be free from squatters or other encumbrances, the form of title envisaged under the first agreement is a final Land Code title of which a final survey has been done. And this, the defendants had failed to deliver to the plaintiff.

[45] The right of an innocent party to terminate a contract is mainly premised on the ground of repudiation or fundamental breach. It is generally accepted that repudiation is where a defaulting party has repudiated the contract before performance is due or before it has been fully performed, whereas a fundamental breach is where the promise which had been violated is one of major importance. An anticipatory breach is where a fixed and exact date has been set for performance and one of the parties has indicated his refusal or inability to performance his part of the bargain. The Federal Court in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464, speaking through the judgment of the learned Richard Malanjum CJ of Sabah and Sarawak said that "… in such circumstances, where it becomes apparent that a breach would be inevitable, the innocent party may be entitled to anticipate the said default and terminate the contract before it is due. This makes perfect commercial sense because the innocent party may proceed to make other necessary arrangements as may be required".

[46] In our view the act of the plaintiff to terminate the two agreements is not an anticipatory breach of the contract. The promise by the defendants to deliver to the plaintiff the land free from encumbrances was already present at the time of the execution of the two agreements and it is a continuing promise until the completion date. However, in between, as shown by the evidence, the plaintiff had raised the issue of the land being encumbered by NCR claims and the defendants had been put on notice by the plaintiff that if the NCR claims are not resolved by the completion date, the plaintiff would not be in position to complete the agreements. On the evidence also it appears that the earliest date possible for survey works to commence in order to determine the extent of the area of the land under NCR claims would be on 26 October 2008, which date would well go beyond the completion date of the agreements which was to be on 1 October 2008. Without the final survey done, it would not be possible for the Land Code title for the land to be issued by the relevant authority.

[47] Therefore, on the facts as found by the learned High Court Judge, the defendants failed to fulfil the two most material conditions to the first agreement namely to give the plaintiff a Land Code title to the land and to ensure that the land would be free from encumbrances before possession is given to the plaintiff. In this respect the plaintiff cannot be said to have committed an anticipatory breach of the two agreements when the defendants themselves had failed to deliver their end of the bargain.

[48] As to the issue of whether the plaintiff had proven its loss and damages resulting from such termination of the agreements and its entitlement to the additional amount of RM4,960,000 as agreed liquidated damages pleaded in the statement of claim, the learned High Court Judge found that the plaintiff had failed to prove that it had suffered loss and damages as pleaded in the statement of claim. The learned judge also found that the documents produced in the plaintiff's supplementary bundle of documents as to the claim for the agreed liquidated damages do not justify such claim. It was the view of the learned High Court Judge that to allow such claim would result in unjust enrichment to the plaintiff and also the learned judge held the view that cl. 18 of the first agreement on agreed special liquidated damages is a punitive provision. However, the learned High Court Judge found that the plaintiff had paid a total sum of RM4,960,000 to the first defendant and RM3,225 to the second defendant and had allowed these amount to be refunded to the plaintiff by the first and second defendants respectively. The learned judge had also refused the plaintiff's claim for special damages relating to expenses and costs on germinated oil palm seeds, a Toyota Hilux vehicle, engagement staff, etc because the special damages were not pleaded and also because in the learned High Court Judge's view the special damages were too remote.

[49] With regard to the issue of whether the defendants as vendor, can forfeit all the moneys paid by the plaintiff as the purchaser, for failing or refusing to complete the purchase as agreed liquidated damages under cl. 17 of the first agreement; the learned High Court Judge had found that because the plaintiff did not commit an anticipatory breach of the agreement, the defendant cannot rely on cl. 17 of the first agreement to make the claim.

[50] Having considered the facts of this case and the reasoning by the learned High Court Judge on these two issues, we find no appealable error that would otherwise have required our intervention as to her findings and conclusions.

[51] For the above reasons, we therefore hereby dismiss this appeal and we affirm the decision of the High Court Judge with costs of RM10,000 to the respondent and we also order that the deposit be refunded to the appellant.